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No. 03-761

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

This Court has held that "[t]he Constitution requires a distinction between what is truly national and what is truly local." The southwestern arroyo toad travels no more than 1.2 miles within California during its lifetime and has no commercial use. Did the court of appeals err in concluding that Congress has authority under the Commerce Clause to regulate interference with this wholly intrastate, noncommercial species?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
INTEREST OF AMICI CURIAE 1
ARGUMENT 2
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Cargill, Inc. v. *United States*, 516 U.S. 955 (1995) 17

Douglas v. *Seacoast Prods., Inc.*, 431 U.S. 265 (1977) 12

GDF Realty Invs., Ltd. v. *Norton*, 326 F.3d 622 (5th Cir. 2003) ..... *passim*

Gibbs v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) 1, 15, 16

Kleppe v. *New Mexico*, 426 U.S. 529 (1976) 12

Missouri v. *Holland*, 252 U.S. 416 (1920) 12

Nat'l Ass'n of Home Builders v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) ..... *passim*

North Dakota v. *United States*, 460 U.S. 300 (1983) 12

Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 1, 10, 12

United States v. *Ho*, 311 F.3d 589 (5th Cir. 2002) 14

United States v. *Lopez*, 2 F.3d 1342 (5th Cir. 1993) 5

United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *Morrison*, 529 U.S. 598 (2000) ..... *passim*

United States v. *Stewart*, 348 F.3d 1132 (9th Cir. 2003) 8

Statutes

16 U.S.C. § 1532(19) 6

16 U.S.C. § 1538(a)(1)(B) 2

18 U.S.C. § 922(q)(1)(A) 5

42 U.S.C. § 13,981 5

Regulations

59 Fed. Reg. 64,859 (Dec. 16, 1994) 2

Other Authorities

Adler, *The Duck Stops Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001) 17

Botkin, *Firth Bridge Work Still Slowed by Endangered Snails in River*, Idaho Falls Post Reg., Dec. 10, 2003 13

Fitzgerald, *Seeing Red:* Gibbs v. Babbitt, 13 Vill. Envtl. L.J. 1 (2002) 17

Kozinski, *Introduction to Volume 19*, 19 Harv. J.L. Pub. Pol. 1 (1995) 14

Kresge, *Fontana Project Hits Old Snag; D.C. Meeting Fails to Give Any Ground for Empire Center's Impact on Endangered Flower-Loving Fly*, San Bernardino Sun, Oct. 16, 2003 13

Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 Ga. L. Rev. 723 (2002) 17

Park, *The Endangered Species Act: Does It Have a Stopping Point?*, 4 Engage 58 (2003) 17

Saad, *Commerce Clause Jurisprudence: Has There Been a Change?*, 23 J. Land Resources & Envtl. L. 143 (2003) 17

Witt, *A Showcase and a Battleground; Fry, Regulators at Odds over How to Protect Habitat at Golf Course*, San Jose Mercury News, July 13, 2003 13

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER

Amici curiae Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF AMICI CURIAE

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has argued as *amicus curiae* in several recent cases that the commerce power does not extend to federal regulation of wild animals. *See, e.g.*, *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

AEF is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared as *amicus curiae* in

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

many cases in which WLF is also involved, including *Gibbs* and *National Association of Home Builders*.

ARGUMENT

The court of appeals sustained, as a valid exercise of the federal government's power to regulate interstate commerce, a federal regulation that extends to the southwestern arroyo toad the protections of section 9(a)(1)(B) of the Endangered Species Act (ESA), 16 U.S.C. § 1538(a)(1)(B), which makes it unlawful to "take" any endangered species. 59 Fed. Reg. 64,859 (Dec. 16, 1994). The arroyo toad inhabits scattered areas of California, and during its lifetime, it does not range any farther than 1.2 miles from the streams in which it breeds. Pet. App. 3a-4a. The arroyo toad has no commercial use or any other links to interstate commerce. Pet. App. 39a.

Petitioner ran afoul of this prohibition on arroyo toad takes when, as part of its plan to construct a 280-home residential development in San Diego County, the company erected a fence that the Fish and Wildlife Service deemed to be an unlawful impediment to the movement of arroyo toads inhabiting the land. Pet. App. 4a-5a. Petitioner responded by challenging the constitutionality of the regulation prohibiting arroyo toad takes, arguing that it exceeds the federal government's authority under the Commerce Clause.

The court of appeals held that the regulation was constitutional because there exists a rational basis for concluding that petitioner's real-estate activities have a substantial effect on interstate commerce. Pet. App. 12a-13a. By framing the issue before it as whether the activities of petitioner substantially affect interstate commerce—rather than as whether the act of taking the arroyo toad has such an effect—the court of appeals strayed far afield from the mode of constitutional analysis that this Court has required in Commerce Clause cases.

A. In *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), this Court refined the framework for evaluating the propriety of federal action under the Commerce Clause. The Court explained that there exist three categories of activities that Congress can regulate pursuant to its commerce power:

> First, Congress may regulate the use of the *channels of interstate commerce*. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or *persons or things in interstate commerce*, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate *those activities having a substantial relation to interstate commerce, i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-59 (citations omitted; emphases added); *see also Morrison*, 529 U.S. at 609. It is beyond *reasonable* dispute that the prohibition on arroyo toad takes regulates neither the channels nor the instrumentalities of interstate commerce. Accordingly, this provision can be sustained only if it regulates an activity that substantially affects interstate commerce.

Lopez and *Morrison* instruct that four inquiries are relevant to determining whether a regulated activity has a substantial effect on interstate commerce: (i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the regulation includes an express jurisdictional element; (iii) whether Congress has made findings regarding the regulated activity's effect on interstate commerce; and (iv) whether the link between the regulated activity and interstate commerce is direct or attenuated. *Lopez*, 514 U.S. at 559-65; *Morrison*, 529 U.S. at 610-12.

In upholding the prohibition on arroyo toad takes, the D.C. Circuit committed several serious errors in the applica-

tion of this test and engaged in a tortured analysis that undermines the limitations inherent in Congress' Commerce Clause authority. Upon a faithful application of the methodology outlined by this Court, it becomes evident that the taking of a wholly intrastate, commercially irrelevant species such as the arroyo toad does not exert a substantial effect on interstate commerce. This conclusion is not in any way altered where the entity committing the take possesses, in its own right, a substantial connection to interstate commercial activity.

1. In the course of explaining the importance of the first prong of substantial effects analysis, this Court stated in *Morrison* that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. In order to circumvent the limitations inherent in this statement, the D.C. Circuit focused its analysis upon the conduct of the regulated entity—Rancho Viejo—rather than upon the expressly regulated activity—the taking of the wholly intrastate and commercially irrelevant arroyo toad. By shifting the manner in which Commerce Clause analysis is framed, the D.C. Circuit was able to reach the conclusion that this case involves the regulation of commercial activity because "the regulated activity is the construction of a 202-acre commercial housing development." Pet. App. 9a. Emphasizing Rancho Viejo's reliance upon building materials and workers that move across state lines, the court further concluded that this regulated activity has a substantial effect on interstate commerce. Pet. App. 12a-13a.

In focusing upon the commercial activities of the regulated entity itself, the D.C. Circuit relied upon the reasoning of its earlier decision in *National Association of Home Builders* v. *Babbitt* ("*NAHB*"), in which the court upheld against a Commerce Clause challenge a regulation prohibiting takes of the Delhi Sands Flower-Loving Fly—a species that, like the arroyo toad, is wholly intrastate and commercially irrelevant.

130 F.3d 1041 (D.C. Cir. 1997). The court determined that the prohibition regulated activity that exerted a substantial effect on interstate commerce because the take was occasioned by the redesign of a traffic intersection to facilitate emergency access to a hospital. *Id.* at 1059 (Henderson, J., concurring); *see also id.* at 1056. The D.C. Circuit's reasoning in both of these decisions is fatally flawed, however, and inconsistent not only with *Lopez* and *Morrison* but also with a recent Fifth Circuit decision that perceptively identified the constitutional infirmities inherent in the D.C. Circuit's Commerce Clause analysis. *See GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622 (5th Cir. 2003).

In *Lopez*, the Gun-Free School Zones Act made it illegal for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). The Court explained that this is "a criminal statute that *by its terms* has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561 (emphasis added). In framing its Commerce Clause inquiry, the Court looked at the activity that the statute, by its terms, expressly regulated, and concluded that commerce was not implicated because the relevant activity for Commerce Clause purposes was the carrying of a gun in a school zone. The fact that the defendant to whom the statute was being applied was engaged in commerce—he had brought the gun to school to sell it—did not alter the Court's conclusion that the statute did not regulate commercial activity. *See United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

Similarly, in *Morrison*, the provision of the Violence Against Women Act therein under consideration provided a federal civil remedy for the victims of gender-motivated violence. 42 U.S.C. § 13,981. In undertaking the first step in its substantial effects analysis, this Court concluded that "[g]ender-motivated crimes of violence are not, in any sense

of the phrase, economic activity." *Morrison*, 529 U.S. at 613. Again, this Court framed its analysis in the terms of the statute itself and paid no heed to the activities in which the regulated individual was engaged.

In this case, the D.C. Circuit ignored this Court's clear guidance on the manner in which to frame a Commerce Clause inquiry. The regulation herein at issue proscribes takes of the arroyo toad. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct." 16 U.S.C. § 1532(19). By its own terms, the regulation proscribes the act of taking an arroyo toad, and the relevant question for Commerce Clause purposes is therefore whether a toad take constitutes commercial or economic activity (and whether that activity has a substantial effect on interstate commerce). The answer to this question is clearly "no." The arroyo toad lives its entire life within several acres of California brush, and it is not the object of any commerce. Accordingly, the prohibition on arroyo toad takes regulates an activity that has neither commercial nor interstate attributes.

In clear contravention of this Court's precedent, however, the D.C. Circuit framed the issue before it as whether Rancho Viejo's real-estate development activities, which precipitated the take, were commercial or economic. Following the D.C. Circuit's reasoning to its logical conclusion leads to the palpably erroneous proposition that Congress has the authority to regulate any local activity engaged in by an entity with links to interstate commerce, while it lacks the authority to regulate the same local activity when it is undertaken by an entity without such a commercial connection. *See GDF Realty*, 326 F.3d at 634 (disavowing the D.C. Circuit's mode of framing Commerce Clause issues, and explaining that accepting such a framework "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors").

Under such a Commerce Clause methodology, the prohibition on arroyo toad takes would be a permissible regulation of interstate commercial activity when applied to a real-estate developer or a trucking company but would be an unconstitutional usurpation of state authority when applied to a local homeowner who interferes with the arroyo toad's habitat to build a treehouse for his children. Indeed, Chief Judge Ginsburg, concurring in the D.C. Circuit's decision, admitted as much. He wrote:

> Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if—the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.

Pet. App. 30a-31a (Ginsburg, C.J., concurring). But whether a fence effecting a take of the arroyo toad can be regulated under the Commerce Clause should not depend on the mere fortuity of who built the fence. This Court made no such distinction in *Lopez* and *Morrison*, where it sustained facial challenges to the statutes under consideration. *See GDF Realty*, 326 F.3d at 635 (explaining that "the facial challenges in *Lopez* and *Morrison* would have failed" under the mode of analysis employed by the D.C. Circuit).

In *GDF Realty*, the Fifth Circuit heard a Commerce Clause challenge to a regulation prohibiting takes of six endangered subterranean species ("the Cave Species"). Each of these species lives in a small area of Texas, and none of them is the object of any commercial activity. *Id.* at 625, 637. The district court, relying upon the same mode of analysis as that

employed by the D.C. Circuit, had rejected a Commerce Clause challenge on the ground that the plaintiffs were contemplating a take of the Cave Species as part of the construction of a Wal-Mart, which constituted a commercial activity that exerted a substantial effect on interstate commerce. *Id.* at 627. The court of appeals held that the trial court erred by focusing upon the plaintiffs' motivations as part of its substantial effects analysis. *Id.* at 636. The court explained that in Commerce Clause cases "the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, *i.e.*, whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect." *Id.* at 633. Pursuant to this analysis, the court concluded that the act of taking a Cave Species organism does not constitute commercial activity and that the regulated entity's participation in interstate commerce does not alter that result. The court explained:

> Neither the plain language of the Commerce clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

Id. at 634; *see also United States* v. *Stewart*, 348 F.3d 1132 (9th Cir. 2003) (holding that a federal statute prohibiting the possession of machineguns contravened the Commerce Clause when applied to a defendant who assembled a homemade weapon for his own collection, notwithstanding the fact that the defendant also sold rifle kits over the Internet and thus had significant connections with interstate commerce).

When the holdings of this Court in *Lopez* and *Morrison*–and the Fifth Circuit's faithful application of those decisions in *GDF Realty*—are brought to bear on the facts of this case,

it becomes readily apparent that the D.C. Circuit incorrectly framed its Commerce Clause inquiry by focusing upon Rancho Viejo's commercial attributes rather than upon the lack of a nexus between arroyo toad takes and interstate commerce. This Court should grant certiorari to resolve this conflict among the lower courts and to clarify the object of the "economic activity" prong of Commerce Clause analysis.

2. The second aspect of substantial effects analysis is an inquiry into whether the statute or regulation includes an express jurisdictional element limiting its reach to matters that impact interstate commerce. The regulation precluding arroyo toad takes does not include any language limiting its reach to takes that have the requisite nexus to interstate commerce. The D.C. Circuit glossed over this shortcoming, stating that "*Lopez* did not indicate that such a hook is required, however, and its absence did not dissuade the *NAHB* court from finding application of the ESA constitutional." Pet. App. 10a.

While the D.C. Circuit is correct that this Court has never held that an express jurisdictional element is a prerequisite to constitutionality, the inclusion of a clause limiting this regulation's reach to arroyo toad takes that possess a connection with interstate commerce would save the provision from facial invalidity. If this regulation, by its terms, proscribed only that hypothetical category of arroyo toad takes that exert a substantial effect on interstate commerce, a court would be required to engage in a case-by-case inquiry into whether, under the specific factual circumstances before it, the requisite connection with interstate commerce was present (notwithstanding the fact that one would be hard-pressed to conceive of a scenario under which an arroyo toad take would actually manifest such a connection). *See Lopez*, 514 U.S. at 561-62. The absence of a jurisdictional element extends the reach of this regulation to all arroyo toad takes—including those that lack the constitutionally mandated nexus with interstate commerce—and results in a regulation that

does not fall within the purview of Congress' Commerce Clause authority.

3. The third factor that a court must weigh as part of its substantial effects analysis is whether Congress made legislative findings regarding the manner in which the regulated activity impacts interstate commerce. There are no legislative findings that address the connection between arroyo toad takes and interstate commerce. Indeed, the prohibition on toad takes was not even enacted by Congress; rather, it was promulgated by unelected officials in the Fish and Wildlife Service. While "[d]ue respect for the decisions of a coordinate branch of Government demands that [this Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds," *Morrison*, 529 U.S. at 607, there is no similar constraint on this Court where it is confronted with a constitutionally suspect agency regulation, *see Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*").

As with the absence of a jurisdictional element, the D.C. Circuit accorded little weight to the lack of legislative findings. The court explained that no such findings were necessary because the significant connection between the construction of a housing development and interstate commerce is visible to the naked eye. Pet. App. 10a-11a. While this assertion may or may not be true, it is completely irrelevant to the question that the D.C. Circuit should have been addressing, which is whether the taking of the wholly intrastate, commercially irrelevant arroyo toad has a substantial effect on interstate commerce. The absence of legislative findings on this point is critical because it is certainly not evident "to the naked eye" that the act of interfering with the habitat of a toad that lives its entire life within a few acres of California brush and that is not the object of commercial transactions exerts a substantial effect on interstate commerce. *Cf. Lopez*, 514 U.S. at 563 ("to the extent that congressional findings

would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here").

4. The final issue that must be considered by a court engaged in substantial effects analysis is whether the link between the regulated activity and interstate commerce is so attenuated that there exists no logical stopping point to Congress' commerce power. *See id.* at 567 (explaining that it is impermissible for a court, in an effort to discern a link between a regulated activity and interstate commerce, to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). Relying again upon its incorrect framing of the issue in this case, the D.C. Circuit determined that no attenuation problem hampers the regulation prohibiting arroyo toad takes. In formulating this conclusion, the court explained that "the rationale upon which we rely focuses on the activity that the federal government seeks to regulate in this case (the construction of Rancho Viejo's housing development)." Pet. App. 11a. Accordingly, the D.C. Circuit had no concerns about attenuation because it concluded that Rancho Viejo's real-estate activities have a direct impact on interstate commerce due to the use of materials and workers that have traveled across state lines. Pet. App. 12a.

If the substantial effects inquiry is reframed to reflect accurately the methodology outlined by this Court in *Lopez* and *Morrison*, however, significant attenuation problems emerge. Any link between destruction of the habitat of the intrastate, commercially irrelevant arroyo toad and interstate commercial activity is dangerously attenuated. If, through some Herculean feat of factual extrapolation, a court were to find that an arroyo toad take exerts a substantial impact on interstate commerce, then there would truly be no logical stopping point to confine Congress' Commerce Clause authority, and

the distinction between the sphere of the federal government and that of the states would be truly obliterated.

On the contrary, it is the states that have long enjoyed plenary authority over the wild animals within their borders. *See, e.g., Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 287-88 (1977) (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). The broad scope of state authority in this realm contrasts sharply with the narrow reach of the federal government, which is limited to regulating wild animals through invocation of its enumerated powers. *See, e.g., id.* (holding that the commerce power authorizes the regulation of animals within the nation's territorial waters (*i.e.*, the channels of commerce)); *North Dakota* v. *United States*, 460 U.S. 300 (1983) (concluding that the spending power authorizes the federal government to acquire, by purchase or easement, private land that may be used as animal habitat); *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) (explaining that the federal government's property power authorizes it to proscribe the harming of wild animals on federal land); *Missouri* v. *Holland*, 252 U.S. 416 (1920) (holding that the treaty power authorizes the federal government to protect animals that are the subject of international concern). This Court has never held, however, that the commerce power authorizes the federal government to regulate wild animals *qua* wild animals. To the contrary, this Court has indicated that such regulation raises serious questions under the Commerce Clause, *see SWANCC*, 531 U.S. at 173-74, and such an incident of centralization would do much to undermine the delicate federal/state balance that is the hallmark of Our Federalism.

In light of the foregoing, it is evident that—when correctly applied—each of the four factors that this Court identified in *Lopez*, and reaffirmed in *Morrison*, indicates that it is not within Congress' Commerce Clause authority to prohibit arroyo toad takes. This Court should grant certiorari to cor-

rect the D.C. Circuit's flawed analysis and to establish that it is impermissible for lower courts to circumvent the limitations on Congress' commerce power by engaging in the type of judicial legerdemain that the D.C. Circuit employed in this case.

B. The significant inconsistencies between the D.C. Circuit's decision and the Commerce Clause framework outlined by this Court in *Lopez* and *Morrison* constitute a weighty reason to grant certiorari. The split between the D.C. Circuit and the Fifth Circuit regarding the correct methodology for "framing" substantial effects analysis, as well as the sharp disagreement among both lower-court judges and legal scholars regarding the constitutionality of endangered species regulations, further demonstrate the necessity for a definitive ruling from this Court.[2]

As discussed above, the manner in which the D.C. Circuit frames its substantial effects analysis is at odds with the methodology employed by the Fifth Circuit, which has expressly disavowed the methodology employed by the D.C.

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[2] Moreover, the frequency with which the federal government invokes the ESA in the name of wholly intrastate, noncommercial species evidences the significant real-world repercussions of this issue. *See, e.g.*, Botkin, *Firth Bridge Work Still Slowed by Endangered Snails in River*, Idaho Falls Post Reg., Dec. 10, 2003, at A1 (demolition of bridge delayed while the Fish and Wildlife Service studies the impact on the Utah Valvata Snail); Kresge, *Fontana Project Hits Old Snag; D.C. Meeting Fails to Give Any Ground for Empire Center's Impact on Endangered Flower-Loving Fly*, San Bernardino Sun, Oct. 16, 2003 (planned development placed in doubt due to the presence of the Delhi Sands Flower-Loving Fly); Witt, *A Showcase and a Battleground; Fry, Regulators at Odds over How to Protect Habitat at Golf Course*, San Jose Mercury News, July 13, 2003, at A1 (modifications to golf course required to protect the California Red-Legged Frog).

Circuit. *See GDF Realty*, 326 F.3d at 636. Judge Sentelle, dissenting from the D.C. Circuit's decision denying an en banc rehearing of this case, pointed to this circuit split, stating that the present decision "is . . . conspicuously in conflict with another circuit. The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." Pet. App. 35a (Sentelle, J., dissenting from denial of rehearing en banc). Judge Roberts acknowledged the same point. Pet. App. 37a ("the approach of the panel in this case and *NAHB* now conflicts with the opinion of a sister circuit . . . ") (Roberts, J., dissenting from denial of rehearing en banc).

The methodological disagreement between the Fifth and D.C. Circuits has profound ramifications for Commerce Clause jurisprudence. Indeed, the choice between the Fifth Circuit's focus upon the commercial effects of the expressly regulated activity and the D.C. Circuit's emphasis upon the commercial attributes of the regulated entity itself is a proxy for whether this Court's recent Commerce Clause decisions are to have any enduring jurisprudential effect.

The D.C. Circuit has chosen to interpret this Court's decisions in a manner that eviscerates the constitutionally mandated limitations on the commerce power that *Lopez* and *Morrison* sought to reaffirm. *See United States* v. *Ho*, 311 F.3d 589, 597 (5th Cir. 2002) (explaining that the motivations underlying this Court's recent Commerce Clause jurisprudence included a desire to prevent the "alarming and dangerous prospect" of a completely centralized government from coming to pass, as well as a desire "to identify judicially enforceable limits on the Commerce Clause"), *cert. denied*, 123 S. Ct. 2274 (2003). Indeed, the D.C. Circuit's methodology harkens back to the pre-*Lopez* era during which Congress exercised a seemingly boundless authority under the Commerce Clause. *See* Kozinski, *Introduction to Volume 19*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995) (writing that in the

pre-*Lopez* era the Commerce Clause should more accurately have been known as the "'Hey, you-can-do-whatever-you-feel-like Clause'"). On the contrary, the manner in which the Fifth Circuit framed its substantial effects analysis represents a faithful implementation of the guidance offered by *Lopez* and *Morrison*.

This Court should act to resolve the split between these two Circuits and to reaffirm the proposition that Congress' commerce power is not without limits. The choice between the Fifth Circuit's approach and that of the D.C. Circuit is in many ways a choice between a federal system of government—such as that endowed by the Framers—and a completely centralized national government—the dangers of which the Framers sought strenuously to guard against.

In the post-*Lopez* era, a number of lower courts have addressed the constitutionality of regulations that prohibit takes of wholly intrastate, commercially irrelevant species. *See GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622 (5th Cir. 2003) (Cave Species takes); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf takes), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving Fly takes), *cert. denied*, 524 U.S. 937 (1998) ("*NAHB*"). While each such decision has ultimately sustained the regulation at issue, a number of these holdings have drawn vigorous dissents from a member of the court (and in *NAHB*, a critical separate concurrence as well). *See Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting); *NAHB*, 130 F.3d at 1060 (Sentelle, J., dissenting); *id.* at 1057 (Henderson, J., concurring); *see also* Pet. App. 33a (Sentelle, J., dissenting from denial of rehearing en banc); Pet. App. 36a (Roberts, J., dissenting from denial of rehearing en banc).

Moreover, the diverging rationales adopted by the majorities in each of these decisions further evidence the confusion that this area of the law has fomented among lower

courts—and the great lengths that these courts will go to uphold endangered species protections. The Fifth Circuit, for example, upheld the prohibition on Cave Species takes because it found the regulation to be an essential part of the ESA, which it deemed to constitute an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 640. The Fourth Circuit found a commercial link between red wolf takes and the tourism, scientific research, and (hypothetical) pelt trade fostered by the species and so upheld the regulation before it. *See Gibbs*, 214 F.3d at 492.[3] In *NAHB*, Judge Wald held that the prohibition on takes of the Delhi Sands Flower-Loving Fly was valid because the elimination of an endangered species "would have a staggering effect on biodiversity . . . and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species" for their medicinal and genetic value. 130 F.3d at 1052. In upholding the regulation, Judge Wald also relied upon the rationale that endangered species takes are the product of "destructive interstate competition," in the form of a race-to-the-bottom to attract development at the expense of the environment's well-being. *Id.* at 1054. In her concurrence, Judge Henderson expressly rejected as unduly speculative Judge Wald's invocation of the present and future commerce in en-

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[3] The *Gibbs* court framed its Commerce Clause inquiry in a manner that is similar to the methodology adopted by the D.C. Circuit, and thus the Fourth Circuit is also implicated in the circuit split presented by this case. The Fourth Circuit determined that the conduct being regulated by the prohibition on red wolf takes was economic in nature because the "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." *Gibbs*, 214 F.3d at 492. By focusing upon the economic motivations of the individuals responsible for the take—rather than upon the commercial connections of the take itself—the Fourth Circuit committed the same framing error that hampered the D.C. Circuit's analysis in *NAHB* and the present case.

dangered species. *Id.* at 1058 (Henderson, J., concurring). Instead, Judge Henderson argued that the regulation was constitutional because the extinction of species will impact "land and objects that are involved in interstate commerce." *Id.* at 1059.

This disagreement among lower-court judges has been mirrored in the legal academy, with scholars both criticizing and commending the court of appeals decisions upholding endangered species regulations against Commerce Clause challenges. *Compare* Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001), *and* Park, *The Endangered Species Act: Does It Have a Stopping Point?*, 4 Engage 58 (2003), *with* Fitzgerald, *Seeing Red:* Gibbs v. Babbitt, 13 Vill. Envtl. L.J. 1 (2002), *and* Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 Ga. L. Rev. 723 (2002). *See also* Saad, *Commerce Clause Jurisprudence: Has There Been a Change?*, 23 J. Land Resources & Envtl. L. 143, 172 (2003) ("The Supreme Court must give a clear directive to the lower courts on how to handle environmental regulation passed under the Commerce Clause.").

In light of the multitude of theories promulgated by judges presented with Commerce Clause challenges to prohibitions on interference with intrastate wild animals, certiorari is warranted to afford this Court the opportunity to reconcile these divisions among the federal judiciary and to properly analyze this issue under the framework set forth in *Lopez* and *Morrison*. *Cf. Cargill, Inc.* v. *United States*, 516 U.S. 955, 955 (1995) (Thomas, J., dissenting from denial of certiorari) (recognizing that "serious and important constitutional questions" about the limits of Congress' commerce power to regulate wild animals "provide a compelling reason to grant certiorari").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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